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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

8 ROYLENE RAY, *et al.*,
9 Plaintiffs,
10 v.
11 BLUEHIPPO FUNDING, LLC, *et al.*,
12 Defendants.
No. C-06-1807 JSW (EMC)
ORDER DENYING IN PART PLAINTIFF'S MOTION TO ADD A THIRD PARTY AND DEFENDANT AND FOR PROTECTIVE ORDER
(Docket No. 210)

ORDER DENYING IN PART THIRD-PARTY AND DEFENDANTS' MOTION FOR PROTECTIVE ORDER

15 Currently pending before the Court is a discovery dispute related to the deposition of Joseph
16 K. Rensin, the CEO of BlueHippo. Both Mr. Rensin and BlueHippo ask for, in effect, a protective
17 order barring his deposition from taking place or, in the alternative, limiting the scope of his
18 deposition, both in terms of subject matter and time. Having considered the parties' briefs and
19 accompanying submissions, the oral argument of counsel, and all other evidence of record, the Court
20 hereby **DENIES** the motion in part.

I. FACTUAL & PROCEDURAL BACKGROUND

22 Mr. Rensin is the CEO of BlueHippo. He allegedly has been with the company since its
23 inception. When Plaintiffs first initiated this class action, they sued not only BlueHippo but also Mr.
24 Rensin in his individual capacity. *See* Docket No. 1 (complaint, filed on 3/8/2006). BlueHippo
25 responded to the complaint with a motion to transfer venue to the District of Maryland; Mr. Rensin
26 responded to the complaint with a motion to dismiss for lack of personal jurisdiction. *See* Docket
27 Nos. 16-17 (motions, filed on 4/24/2006). Subsequently, Plaintiffs voluntarily dismissed Mr. Rensin
28 from the case without prejudice. *See* Docket No. 23 (notice, filed on 5/9/2006). In a joint case

1 management conference statement that was thereafter filed, Plaintiffs stated that they “intend[ed] to
2 add Mr. Rensin [back in] as a defendant in the event discovery confirm[ed] that BlueHippo is his
3 alter ego with regard to Plaintiffs’ claims.” Docket No. 56 (Statement at 8). Plaintiffs subsequently
4 filed a motion to amend the complaint, seeking, *inter alia*, to add Mr. Rensin as a defendant. *See*
5 Docket No. 178 (motion). That motion is still pending.

6 Prior to filing the motion to amend, Plaintiffs noticed the deposition of Mr. Rensin on June
7 18, 2008. *See* Docket No. 153 (Schoenberg Decl., F) (notice). In response, Mr. Rensin and
8 BlueHippo moved for a protective order, asking that the Court bar the deposition from taking place.
9 *See* Docket No. 161 (motion, filed on 8/11/2008). Mr. Rensin and BlueHippo argued that Plaintiffs
10 sought to take his deposition “to try to collect information related to their new motion to add Mr.
11 Rensin back into the complaint, not to collect information necessary for class certification.” Docket
12 No. 161 (Mot. at 6). Mr. Rensin and BlueHippo further argued that, since he is BlueHippo’s CEO,
13 the apex doctrine is applicable, and Plaintiffs should not be entitled to take his deposition until after
14 they “exhausted other avenues of discovery.” Docket No. 161 (Mot. at 8). Ultimately, the Court
15 held that it would reserve ruling on the issue of the Rensin deposition until after the 30(b)(6)
16 deposition of BlueHippo had taken place. *See* Docket No. 186 (order, filed on 8/22/2008). The
17 Court specifically instructed the parties that, after the 30(b)(6) deposition, they were to “meet and
18 confer to determine whether the Rensin deposition should proceed and, if so, what its scope should
19 be in light of the what information [had] been provided at the 30(b)(6) deposition.” Docket No. 186
20 (Order at 1). The Court noted that, given BlueHippo’s small size and what appeared to be Mr.
21 Rensin’s central and active role in the company, it would take a liberal view of the apex doctrine.
22 *See* Docket No. 186 (Order at 1-2).

23 Subsequently, the 30(b)(6) deposition took place, and the parties, as well as Mr. Rensin,
24 continued to disagree as to whether the Rensin deposition should take place and, if so, whether there
25 should be any limitations. The Court therefore instructed the parties and Mr. Rensin to file cross-
26 briefs to address the dispute, *see* Docket No. 207 (notice, filed on 10/30/08), and a hearing on the
27 matter was held by telephone on November 5, 2008.

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1 As of the date below, Judge White has not ruled on Plaintiffs' motion for leave to amend,
2 and therefore Mr. Rensin, in his individual capacity, is currently not a party to the litigation. The
3 parties do not dispute, however, that as an active CEO, he is a percipient witness to the case against
4 BlueHippo.

II. DISCUSSION

6 In the Court's previous order, it noted that Mr. Rensin -- BlueHippo's CEO -- appeared to
7 have a central and active role in the company. Plaintiffs have made a sufficient proffer to support
8 that Mr. Rensin did have such a role and further that, based on this role, he could provide either
9 additional or different information from that provided by the 30(b)(6) deponent. For example, as
10 indicated by the 30(b)(6) deposition, Mr. Rensin had a primary role in the Gateway relationship. In
11 addition, Mr. Rensin had what appears to be a significant role with respect to the call centers (*e.g.*, if
12 problems arose with the centers). Plaintiffs have also indicated that Mr. Rensin may have direct
13 knowledge about how the business models were actually put into place (*i.e.*, based on his
14 technological knowledge).

15 The 30(b)(6) deponent was able to provide a substantial amount of information at his
16 deposition. However, as outlined above, Plaintiffs have made a sufficient showing that Mr. Rensin
17 could provide either additional or different information from that provided by the 30(b)(6) deponent.
18 Importantly, Mr. Rensin and BlueHippo concede that he is a percipient witness who possesses
19 relevant information. They further concede that Mr. Rensin's deposition may be taken; they simply
20 do not want his deposition to be taken now.

21 Ultimately, none of Mr. Rensin and BlueHippo's objections are availing. First, the Court has
22 already stated that it will not allow any questions at his deposition related to alter ego given that, at
23 this juncture in the proceedings, he is not a party in the case. Thus, by so limiting the scope of the
24 deposition, Plaintiffs will not be permitted to use or exploit this deposition simply as a ruse to obtain
25 evidence to support their motion to amend the complaint.

26 Second, the purpose behind the apex doctrine is to prevent harassment of a high-level
27 corporate official where he or she has little or no knowledge. *See* 6-26 Moore's Fed. Prac. -- Civ. §
28 26.105[2][a] (noting that "courts often are reluctant to permit 'apex' depositions of highest-level

1 corporate officers or managers who are unlikely to have personal knowledge of the facts sought by
2 the deposing party"); *see also Liberty Mut. Ins. Co. v. Superior Court*, 10 Cal. App. 4th 1282, 1287
3 (1992) (noting that "[t]he head of a large national corporation will generally not have knowledge of
4 a specific incident or case handled several levels down the corporate pyramid"). As noted above,
5 Mr. Rensin does have personal knowledge, which is not surprising given that BlueHippo is a
6 relatively small company, not a large national corporation. Moreover, Mr. Rensin and BlueHippo
7 have admitted that there is no burden in having his deposition take place -- *e.g.*, although he is the
8 CEO, his deposition would not disrupt BlueHippo's business. *Cf. Moore's* § 26.05[2][a] ("A party
9 seeking the testimony of a highly placed government official may be required to demonstrate some
10 extraordinary circumstance or special need for the witness's testimony. The policy behind this rule
11 is that a government official who has greater duties and time constraints than other witnesses should
12 be protected from the constant distraction of testifying in lawsuits."). Since Mr. Rensin appears to
13 have substantial personal knowledge of relevant facts and his deposition would impose no business
14 hardship, the apex doctrine should be liberally applied, if at all, in favor of permitting the deposition.
15 As Plaintiffs have made some showing why information might be obtained from Mr. Rensin which
16 is beyond or different from the 30(b)(6) deposition, the apex doctrine is not a bar here.

17 Third, although Mr. Rensin¹ has voiced concerns about criminal liability based on alleged
18 threats made by Plaintiffs' counsel to contact government authorities, that is not a reason to prevent
19 the deposition from going forward at all. But he can assert whatever rights he has (*e.g.*, under the
20 Fifth Amendment) in the deposition.

21 Fourth, Mr. Rensin's contention that he is not subject to personal jurisdiction in this forum,
22 and therefore the deposition should be put off until after Judge White has ruled on Plaintiffs' motion
23 to amend, is without merit. First, personal jurisdiction is irrelevant because Mr. Rensin is being
24 deposed as a corporate witness. In any event, if Judge White denies Plaintiffs' motion to amend,
25 such that Mr. Rensin cannot be added as a party to this case, there is nothing to bar Plaintiffs from
26 initiating a separate lawsuit against Mr. Rensin, perhaps in a different venue. Likewise, if Judge

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28 ¹ Although Mr. Rensin is not currently a party to the action, Mr. Rensin's personal counsel
appeared at the hearing to make arguments on his behalf.

1 White grants Plaintiffs' motion and Mr. Rensin then moves to dismiss for lack of personal
2 jurisdiction (or, alternatively, moves to transfer), Mr. Rensin may be sued at another venue. In other
3 words, there is no guarantee that his personal liability will be eliminated. Judge White's ruling on
4 the motion to amend will not obviate the concern Mr. Rensin has posed in seeking to delay the
5 deposition. It is not uncommon for an individual such as a CEO to be at risk of personal liability in
6 these kinds of cases. That fact alone does not stop discovery from proceeding and is no reason to
7 ban or delay Mr. Rensin's deposition here.

8 Finally, Mr. Rensin and BlueHippo suggest that it would impose an undue burden for the
9 deposition to go forward because Mr. Rensin would have to be specially prepared given the risk of
10 personal liability. Apart from the fact that delay will not resolve that risk as noted above, the Court
11 finds this assertion factually without merit. Mr. Rensin has been on notice since mid-June 2008 that
12 Plaintiffs wish to take his deposition. Moreover, since late August 2008, Mr. Rensin has been aware
13 that the Court might well allow the deposition to proceed because, under the circumstances, it was
14 taking a liberal view of the apex doctrine. While many documents may have been produced by
15 BlueHippo, there is no evidence that Mr. Rensin cannot be prepared for a deposition on November
16 14, 2008, particularly as his counsel and counsel for BlueHippo appear to be working
17 collaboratively and Mr. Rensin appears to be playing a role in this case, even if not a direct party to
18 the lawsuit.

19 To be sure, BlueHippo has raised substantial questions about the efficiency of the proposed
20 deposition. The Court notes that, based on its review of the transcript excerpts cited, Plaintiffs
21 appear to be looking into issues that are marginally relevant to class certification or looking for a
22 level of detail that may not be realistic given that Mr. Rensin does not have a duty to prepare as did
23 the 30(b)(6) deponent. The answer to this concern is that a deposition now will diminish time
24 available for any further deposition after class certification is ruled on.

25 Plaintiffs shall have, consistent with the Federal Rules of Civil Procedure, a total of seven
26 hours to depose Mr. Rensin for all purposes in this case (*i.e.*, class certification and merits), *see* Fed.
27 R. Civ. P. 30(d)(1) (providing that a deposition is limited to seven hours), and the time spent on this
28 class certification deposition shall be counted towards the total seven-hour limit. Should Plaintiffs

1 later seek permission to exceed the seven hour limit, *see* Fed. R. Civ. P. 30(d)(1) (providing that a
2 "court must allow additional time consistent with Rule 26(b)(2) if needed to fairly examine the
3 deponent or if the deponent, another person, or any other circumstance impedes or delays the
4 examination"), they are forewarned that this Court will not consider any inefficiency that occurs
5 during this deposition.

6 **III. CONCLUSION**

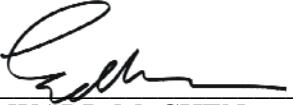
7 The Court therefore orders that the deposition of Mr. Rensin proceed on November 14, 2008.
8 The deposition shall take place in Baltimore. The parties shall meet and confer as to the precise
9 location for the deposition, as well as the time.

10 The scope of the deposition shall be limited to class certification issues. No questions related
11 to alter ego may be asked.

12 This order disposes of Docket No. 210.

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14 IT IS SO ORDERED.

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16 Dated: November 6, 2008

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EDWARD M. CHEN
United States Magistrate Judge